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No. 82-97

IN THE

Supreme Court of the United States

October Term, 1982

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in determining that the Copyright Royalty Tribunal acted properly and did not act arbitrarily and capriciously in adjusting the compulsory license fee for jukeboxes as mandated by the 1976 Copyright Act, 17 U.S.C. § 101 *et seq.*

TABLE OF CONTENTS

PAGE

Question Presented i

Statement Of The Case 1

The Parties 2
The Copyright Royalty Tribunal 2
The Performing Rights Organizations 3
The Jukebox Operators 4

Prior Proceedings 4
The Copyright Royalty Tribunal 4
The Court of Appeals 5

Reasons For Denying The Writ 5

I. The Tribunal's Determination Was Factual; It Raises No Legal Issue Worthy of This Court's Attention 5

II. Congress Recognized that This Ratemaking Process Had a Collective Nature, and that Inquiry Into the Internal Distribution Procedures of Performing Rights Societies Was Not Warranted 7

III. There Is No Question of General Importance Presented Warranting Review By This Court . 8

Conclusion 10

TABLE OF AUTHORITIES

CASES:

Broadcast Music, Inc. v. *CBS*, 441 U.S. 1 (1979) 3, 4, 7, 8

Recording Industry Association of America v. *Copyright Royalty Tribunal*, 662 F.2d 1, 18 (D.C. Cir. 1981) 9

PAGE

STATUTES:

17 U.S.C. § 1(e) (repealed 1976) 2
17 U.S.C. § 101 i
17 U.S.C. § 111 3
17 U.S.C. § 115 3
17 U.S.C. § 116 2
17 U.S.C. § 116(a) 4
17 U.S.C. § 116(b) 4
17 U.S.C. § 116(b)(1)(A) 2
17 U.S.C. § 116(c)(4)(B) 7
17 U.S.C. § 116(e)(3) 3, 7
17 U.S.C. § 118 3
17 U.S.C. § 801(b)(1)(A)-(D) 6
17 U.S.C. § 801(b)(1)(B) 7
17 U.S.C. § 804 3
17 U.S.C. § 804(a)(1) 4
17 U.S.C. § 804(a)(2)(C) 4

ADMINISTRATIVE AUTHORITIES:

Public Broadcasting Rate Proceedings. 43 FR 25068 (June 8, 1978) 9

37 CFR § 304.10 9

LEGISLATIVE AUTHORITIES:

S. Rep. No. 94-473, 94th Cong., 1st Sess. 99 (1975) 2

H. Rep. No. 94-1476, 94th Cong., 2d Sess. 113, 115 (1976) 2

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STATEMENT OF THE CASE

This case is but one of many in which the courts find administrative agency actions to be within the scope of agency discretion. Here, as required by the 1976 Copyright Act, the Copyright Royalty Tribunal adjusted the compulsory license fee paid by jukebox operators for the right to perform copyrighted music. Its determination was upheld in all respects by the Court of Appeals. There is nothing novel or unique about this case that warrants review by this Court.

The Parties

The Copyright Royalty Tribunal

Prior to enactment of the 1976 Copyright Act, jukebox operators—unlike virtually all other commercial users of music—were not required to obtain a license to perform publicly copyrighted music. 17 U.S.C. § 1(e) (repealed 1976). The inequity of that exemption was recognized and corrected by the 1976 Copyright Act, which took effect January 1, 1978 and which established a compulsory license for such performances. 17 U.S.C. § 116. The annual compulsory license fee was initially fixed by statute at $8 per jukebox. 17 U.S.C. § 116(b)(1)(A).

The $8 fee was not related to any economic facts.* Congress recognized that the $8 fee would have to be adjusted, that an adjustment should be made promptly after the new law became effective, and that further periodic adjustments would be necessary as economic conditions changed.

Congress also recognized that it was not the proper body to make such adjustments. It established a new administrative agency within the Legislative branch, the Copyright Royalty Tribunal, and gave the Tribunal the

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* See, S. Rep. No. 94-473, 94th Cong., 1st Sess. 99 (1975):

> "The royalty rate of $8 per box is derived from action of the House of Representatives in 1967. That rate was adopted without the benefit of adequate analysis of the relevant economic data, and the rate has not been adjusted to reflect the significant inflation since 1967.
>
> This committee has accepted the $8 jukebox royalty in the expectation that it would be subject to periodic review. If such a review is to be precluded, the committee recommends that the royalty rate be now adjusted to provide a payment which is reasonable under existing conditions."

In essence, then, the $8 fee was a political compromise. See H. Rep. No. 94-1476, 94th Cong., 2d Sess. 113, 115 (1976), quoted in the Court of Appeals' decision, App. 3 (references are to the Appendix to the petition).

task, among others, of periodic adjustment of the jukebox compulsory license fee.* This case concerns the first such adjustment.

The Performing Rights Organizations

Congress expected the tens of thousands of composers, authors and publishers of music to be represented in these proceedings by three organizations it defined in the Copyright Act as "performing rights societies." 17 U.S.C. § 116(e)(3). These organizations are the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and SESAC, Inc. They represent, in the United States, virtually all owners of copyrighted music.

ASCAP, the oldest and largest, is an unincorporated membership association of writers and publishers of music.** Its members authorize ASCAP to license, nonexclusively, and on a blanket basis, the right of nondramatic public performance of their music. ASCAP licenses public performances by many types of music users, including broadcasting stations and networks, bars, grills, taverns, restaurants and nightclubs, background music operators, hotels and motels, concert promoters, and colleges and universities. All license fees collected are distributed to the members after deduction of operating expenses. For a description of the history and function of ASCAP, see *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979).

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* 17 U.S.C. § 804. The Tribunal's other duties include periodic adjustment of compulsory license fees for retransmissions of broadcasts by cable television (17 U.S.C. § 111), for the making of "mechanical" recordings of music (17 U.S.C. § 115), and for transmissions by public broadcasting (17 U.S.C. § 118). In addition, the Tribunal is empowered to distribute the jukebox and cable royalties to the various copyright owner claimants to those royalties.

** As ASCAP is an unincorporated membership association, no listing pursuant to Rule 28.1 of this Court's Rules is necessary.

BMI is a corporation owned and run by the broadcasting industry, the principal commercial user of music. It, too, licenses, on a blanket basis, its affiliates' nondramatic performing rights. *Id.*

SESAC is a family-owned corporation, licensing far fewer compositions than ASCAP or BMI.

The Jukebox Operators

Jukeboxes are usually owned by "operators," who place the machines in establishments open to the general public ("locations"). The operators are liable for compulsory license fees under the Copyright Law. 17 U.S.C. § 116(a) and (b). The operators typically also furnish other coin-operated devices to locations, including cigarette and other vending machines, pinball machines, video games and other amusement devices. The revenues from these machines are almost invariably split 50-50 between the operator and the location owner.

Many jukebox operators appeared in the Tribunal's proceedings through their trade association, the Amusement and Music Operators Association (AMOA).

Prior Proceedings

The Copyright Royalty Tribunal

The proceeding to adjust the initial $8 rate started automatically under the statute. 17 U.S.C. § 804(a)(1). The Tribunal held extensive hearings in which ASCAP, BMI, SESAC and the AMOA participated. A three-member majority of the Tribunal determined that an annual per box fee of $50 was reasonable. Since the rate would be in effect for 10 years the statute, from 1981 through 1990, the decision provided for an inflation adjustment. 17 U.S.C. § 804(a)(2)(C). The majority also concluded that this "reasonable" fee should not be put into effect immediately,

but rather should be phased-in. Thus, the majority's determination of annual fees for the next 10 years was:

1981	$ 8	
1982-83	25	
1984-86	50	
1987-90	50	plus difference in Consumer Price Index between February 1981 and August 1986.

Two Tribunal members dissented. Commissioner Garcia would have set the $25 and $50 fees at $30 and $60. Chairman James would have set the fee at $130, effective immediately, in 1981.

The Court of Appeals

Both ASCAP and the AMOA appealed the Tribunal's decision to the Seventh Circuit. We appealed on two grounds: that the $50 fee fell below the $70-$130 "zone of reasonableness" established by the record and that the $50 fee determined to be "reasonable" should have been made effective immediately, and not phased-in over three years.

The AMOA argued that the $50 fee was too high for a variety of reasons, including those on which its petition is based.

The Court of Appeals rejected both appeals. It concluded "that the Tribunal's final rule is lawful in all respects." App. 2.

REASONS FOR DENYING THE WRIT

I. The Tribunal's Determination Was Factual; It Raises No Legal Issue Worthy of This Court's Attention

The statute gives detailed and explicit guidance to the Tribunal as to the objectives it must achieve in adjusting the compulsory license fees. They are set forth in 17 U.S.C.

§ 801(b)(1)(A)-(D). App. 65. The Tribunal dutifully analyzed the evidence in light of those objectives. App. 54-57. The Court of Appeals then examined the Tribunal's determination with specific reference to those objectives and found it satisfactory. App. 3-4, 8-9.

The Tribunal concluded that analogous marketplace prices formed the best basis for determination of a reasonable license fee, subject to limitations. App. 52. The Court of Appeals endorsed this concept, stating that other uses of analogous marketplace prices in setting regulated prices "have been repeatedly endorsed as appropriate ratemaking devices." App. 26. The Tribunal did not act arbitrarily and capriciously in using these analogies as benchmarks. App. 27.

The AMOA complains that the $50 fee is too high and wants the $8 fee left unchanged. But the Tribunal found that the AMOA's evidence, introduced to justify maintaining the status quo, was not credible: "The Tribunal finds that the case presented by the AMOA, including the industry survey, has failed to provide reliable data concerning the operating expenses, revenues or return on investment of jukebox operators." App. 51.

The AMOA, of course, cannot hope to overturn this factual assessment of its evidence. It therefore wraps its argument in the cloak of a "legal" theory: the Tribunal, the AMOA claims, has determined a "monopoly price" for a use to which "Congress explicitly denied monopoly protection." The "monopoly price" is allegedly that which would be charged in the marketplace in the absence of a compulsory license.

The AMOA's cloak of legal theory is spun from whole cloth: Congress has neither explicitly nor implicitly granted second-class property rights to copyright owners for jukebox uses, nor is there any "monopoly pricing" involved here. There is absolutely nothing in the statute or legisla-

tive history that even hints at the notion that Congress expected the Tribunal to set a different value for copyrighted works subject to a compulsory license than would be arrived at in the marketplace.*

II. Congress Recognized that This Ratemaking Process Had a Collective Nature, and that Inquiry Into the Internal Distribution Procedures of Performing Rights Societies Was Not Warranted

The AMOA complains that the Tribunal made no inquiry into the finances of individual songwriters in applying the statutory objective of a "fair return" to copyright owners. 17 U.S.C. § 801(b)(1)(B). Performing rights, however, are licensed on a collective, blanket basis through the performing rights societies.**

Congress recognized the collective nature of this performing rights licensing. The statute specifically mandates distribution of the jukebox compulsory license fees to "performing rights societies." 17 U.S.C. § 116(e)(4)(B). It specifically defines ASCAP, BMI and SESAC as "performing rights societies." 17 U.S.C. § 116(e)(3). The Tribunal found that the Copyright Act recognizes that "fair return" can here be measured on a collective basis:

> "It is thus our opinion that the Act recognizes a practical necessity for individual creators of music to adequately protect their performing rights and for users, such as the jukebox industry, to conveniently acquire performing rights. We conclude, therefore, that the 'fair return' to music copyright owners, *i.e.*,

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* The AMOA's claim that the Tribunal erred by placing "complete reliance on monopoly [marketplace] price analogies" proves too much. (Pet. 14.). If the Tribunal had completely relied on the marketplace analogies and set a true marketplace price for the jukebox compulsory license, that price would have been in the $70-$130 range we suggested, not the $50 fee actually set. App. 25.

** Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).

> the reasonable value of the performing right can be established on a collective basis." App. 50. See, generally, App. 48-50.

The Court of Appeals found that the Tribunal's conclusions were correct. App. 29-30. Indeed, the Court of Appeals went further than the Tribunal did:

> "[W]e believe it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her 'investment' in copyrighted material. See *Permian Basin Area Rate Cases*, 390 U.S. at 805-13" App. 30. See, App. 7-8.*

The conclusions of the Tribunal and the Court of Appeals are in accord with this Court's decision in *Broadcast Music, Inc.* v. *CBS*.** There, this Court cited the very jukebox compulsory license at issue here as an example of Congressional endorsement of the collective blanket license.***

III. There Is No Question of General Importance Presented Warranting Review By This Court

None of the other points made by the AMOA warrants review by this Court. The Tribunal acted well within its discretion in setting an automatic one-time inflation adjustment. Indeed, it would be quite unfair, and certainly not "reasonable," for a rate set by the Tribunal in 1980 dollars to remain unadjusted when the Tribunal knew that the value of those 1980 dollars was being substantially eroded year after year.

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* The AMOA's notion that costs and investments of individual songwriters can be measured against their revenues is a silly one. A song may take only a minute to create, and yet be very valuable over a long period of time. How can one measure the "costs" of creative genius?

** 441 U.S. 1 (1979).

*** Id., 15.

There is ample precedent for such an adjustment: The Tribunal used an annual CPI inflation adjustment in the very first proceedings it conducted.* And, the Court of Appeals for the District of Columbia Circuit has approved of such an automatic adjustment in still other Tribunal proceedings.** Indeed, the very fact that the fees will not, by law, be reviewed for ten years argues *for* an automatic inflation adjustment. As the Court of Appeals here said:

> "[A] cost of living or other inflation adjustment designed to maintain the real value of the fee set by the Tribunal is not prohibited but is instead affirmatively supported by the language of the Act." App. 22.

Contrary to the AMOA's argument, neither the Tribunal nor the Court of Appeals has departed from long-settled principles of copyright and administrative law.

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* Public Broadcasting Rate Proceedings, 43 FR 25068 (June 8, 1978); see 37 CFR § 304.10.

** Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1, 18 (D.C. Cir. 1981). The court disapproved of an adjustment mechanism that would have required an exercise of the Tribunal's discretion between the dates set by statute for rate reviews, but endorsed an automatic adjustment mechanism.

CONCLUSION

The petition for a writ of certiorari should be denied.

New York, New York
September 17, 1982

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